FILED

(2) 96184-7 JUL 21 1997

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

The State of New Mexico Energy, Minerals and Natural Resources Department, The Commissioner for Public Lands for the State of New Mexico, Pacific Gas & Electric Company, and Southern California Gas Company,
Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

---

BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James R. McCotter
Vice President and
Deputy General Counsel
Michael D. Ferguson
Associate General Counsel
El Paso Natural Gas
Company
P. O. Box 1492
El Paso, Texas 79978
(915) 496-2600

*Richard C. Green
Judy A. Johnson
Kenneth M. Minesinger
Robert M. Lamkin
Andrews & Kurth L.L.P.
A Registered Limited Liability Partnership
1701 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 662-2700

*Counsel of Record

July 21, 1997

18 pgs

QUESTION PRESENTED

Whether the Court of Appeals correctly held the Federal Energy Regulatory Commission adopted a permissible interpretation of the Natural Gas Act, which expressly excludes the "gathering of natural gas" from the Commission's jurisdiction, when it ruled that El Paso Field Services Company ("Field Services"), a corporation engaged solely in gathering and not in jurisdictional sales or transportation, would not be subject to regulation under the Act.

PARTIES TO THE PROCEEDINGS

Respondent El Paso Natural Gas Company ("El Paso") is a corporation organized and existing under the laws of the State of Delaware. El Paso has the following non-wholly owned subsidiaries and affiliates:

Altamont Gas Transmission Co.
Border Gas Inc.
Compania Samalayuca II, S.A. de C.V. (Mexico)
Cornerstone/Merit Joint Venture
Deepsea Ventures, Inc.
El Paso Energy Mexico S.A. de C.V. (Mexico)
Energy Equity EPIC (SengKang) Pty. Ltd. (Australia)
EPEC East Natural Gas L.P.
EPEC Midwest Natural Gas L.P.
EPED Aguaytia Co. (Cayman Islands)
Epic Energy Pty. Ltd. (Australia)
Epic Energy Australia Pty. Ltd. (Australia)
Epic Energy Queensland Pty. Ltd. (Australia)
Epic Energy South Australia Pty. Ltd. (Australia)
Epic Energy Operations and Maintenance Pty. Ltd. (Australia)
EPIC Gas Transportes S.A. (Chile)
EPIC Samalayuca A, L.L.C.
EPIC Samalayuca B, L.L.C.
EPIC Yucatan Pipeline Co. (Cayman Islands)
The F and E Oyster Partnership
Garvin County Pipeline
Gas de Chile S.A. (Chile)
Gasoduco Transandino S.A. (Chile)
Greater Houston Small Business Equity Fund, Inc.
GreyStar Corp.
H.T. Gathering Co.

Marlin do Brasil Perfuacoes Maritimas Ltda. (Brazil)
MASSPOWER
MESBIC Financial Corp. of Houston
Metroplex Pipeline Co. L.L.C.
Mountain Creek Joint Venture
The Oasis Company
Oletha Partners
Oletha Pipeline I, Ltd.
Oletha Pipeline II, Ltd.
Orange Cogeneration L.P.
Orange Cogeneration GP II, Inc.
Overthrust Pipeline Co.
Pasotronica, S.A. de C.V. (Mexico)
Polk Power GP II, Inc.
Polk Power Partners, L.P.
PT Energy SengKang (Indonesia)
Salawesi Energy Pty. Ltd. (Australia)
SAM II Equity Funding, L.L.C.
Samalayuca Holding Partnership.
Tellepsen Pipeline Services Co.
Tembec Co
Valley Pipeline L.L.C.
The Western Market Center Joint Venture
Wielkopulska Energia S.A. (Poland)

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 5

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT AND REACHES THE SAME RESULT AS A RECENT RULING BY THE D.C. CIRCUIT. 5

II. THE COMMISSION'S ORDERS ARE CONSISTENT WITH THE DECISIONS OF THIS COURT INTERPRETING THE NATURAL GAS ACT 6

III. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE FERC ADOPTED A PERMISSIBLE INTERPRETATION OF THE NATURAL GAS ACT 8

CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES

Chevron U.S.A., Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 8, 9, 10

Colorado Interstate Gas Co. v. FPC,
324 U.S. 581 (1945) ..... passim

Conoco, Inc. v. FERC, 90 F.3d 536 (D.C. Cir. 1996),
cert. denied sub nom., Amoco Energy Trading Corp. v. FERC,
__ U.S.__, 117 S. Ct. 1017 (1997) 6, 7

Interstate Natural Gas Co. v. FPC,
331 U.S. 682 (1947) ..... passim

MCI Telecomm. Corp. v. American Tel. & Tel. Co.,
512 U.S. 218 (1994) 10

Northern Natural Gas Co. v. FERC,
929 F.2d 1261 (8th Cir. 1991) 5

Pacific Gas & Electric Co. v. FERC,
106 F.3d 1190 (5th Cir. 1997) 3

United Distrib. Cos. v. FERC,
88 F.3d 1105 (D.C. Cir. 1996), *cert. denied*,
__ U.S. __, 117 S. Ct. 1123 (1997) 3

ADMINISTRATIVE AUTHORITIES

Arkla Gathering Services Co., 69 FERC ¶ 61,280 (1994) 3

El Paso Natural Gas Co., 72 FERC ¶ 61,220 (1995) 4

El Paso Natural Gas Co., 73 FERC ¶ 61,224 (1995) 4, 9, 10

Order No. 636, 57 Fed. Reg. 13,267 (1992), Order No. 636-A, 57 Fed. Reg. 36,128 (1992), Order No. 636-B, 57 Fed. Reg. 57,911 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993) 3

STATUTES AND REGULATIONS

15 U.S.C. § 717-717w. 1

15 U.S.C. § 717a(6) 9

15 U.S.C. § 717(b) ..... passim

15 U.S.C. § 717c(a) 9

15 U.S.C. § 717d(a) 9

15 U.S.C. § 717f 4

No. 96-1847

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

The State of New Mexico Energy, Minerals and Natural Resources Department, The Commissioner for Public Lands for the State of New Mexico, Pacific Gas & Electric Company, and Southern California Gas Company,
Petitioners,

v.

Federal Energy Regulatory Commission,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit

---

BRIEF OF RESPONDENT EL PASO NATURAL GAS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Natural Gas Act ("NGA" or "Act"), 15 U.S.C. §§ 717-717w, selected by the Petitioners at pages 2-3 of the Petition, this case involves Section 1(b) of the Act, 15 U.S.C. § 717(b), which provides, in pertinent part:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . and to natural-gas companies engaged in such transportation or sale, but shall not apply to . . . the production or gathering of natural gas.

STATEMENT OF THE CASE

Although natural gas moves in a continuous flow from the wells where it is produced to the burnertips where it is consumed, the natural gas industry consists of a number of different segments. As presently structured, the principal segments are: (1) gas exploration and production; (2) gas gathering, which involves the process of collecting gas produced at individual wells and moving such gas through a series of pipes to a processing plant or other central point; (3) marketing, either to end users, distributors, or other marketers; (4) transportation performed by interstate and/or intrastate pipelines; and (5) local distribution to end users. Interstate transportation is regulated by the Federal Energy Regulatory Commission (the "Commission" or "FERC") pursuant to the NGA, while local distribution and, in some states, intrastate transportation are regulated by the various states.

In general, gathering can be performed by a gas producer (or its affiliate), by a gathering company not affiliated with either a producer or a pipeline, by an interstate pipeline, or by an affiliate of an interstate pipeline solely engaged in gathering (referred to herein as an "affiliated gatherer"). According to a recent Commission order, approximately 70 percent of gathering in the U.S. is performed by independent gatherers, that is, companies that are not interstate pipelines or affiliated gatherers. *Arkla Gathering Services Co.*, 69 FERC ¶ 61,280, at 62,090 (1994). As the court below found, there is "no question that FERC does not have the authority to regulate" (and in fact does not regulate) gathering performed by independent gatherers. *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190, 1196 (5th Cir. 1997) ("*PG&E*"). The question addressed in the orders and opinion below is whether, despite the express exemption of Section 1(b), the Commission has jurisdiction over affiliated gatherers such as Field Services.

Historically, interstate pipelines provided a "bundled" sales service which included, in the sales price, all costs associated with getting the gas from the wellhead to the pipeline's customers, including the costs of the gas itself, gathering the gas, and then transporting it to customers. In 1992, however, the Commission issued Order No. 636,[1] which required, among other things, that all interstate pipelines "unbundle" their services by offering each service separately. Thus, some pipelines began to provide a stand alone gathering

---

[1] Order No. 636, 57 Fed. Reg. 13,267 (1992), *on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (1992), *on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part, United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) (per curiam), *cert. denied*, __ U.S. __, 117 S. Ct. 1123 (1997).

service that was separate from both their sales service and their transportation service. In response to the Commission's unbundling policy, in 1994 El Paso sought Commission authorization to abandon certain of its gathering facilities and convey them to Field Services, which would not be subject to the jurisdiction of the Commission and therefore could compete on even terms with independent gathering companies.[2/]

In 1995, the Commission authorized the abandonment and ruled that it "does not have jurisdiction over companies such as Field Services that perform only a gathering function." *El Paso Natural Gas Co.*, 72 FERC ¶ 61,220, at 62,014 (1995), *reh'g denied*, 73 FERC ¶ 61,224 (1995). The Court of Appeals for the Fifth Circuit, adopting a rationale substantially identical to that in a recent D.C. Circuit opinion addressing the same issue, upheld the Commission's determination. Petition, Appendix A at 11-12.

2/ Most of El Paso's gathering facilities had never been constructed pursuant to certificates of public convenience and necessity under the Commission's NGA Section 7 authority, 15 U.S.C. § 717f, and thus did not require Commission abandonment authorization to be transferred to Field Services. *See El Paso Natural Gas Co.*, 72 FERC ¶ 61,220, at 62,004 (1995). The gathering facilities that required abandonment authorization either had once been certificated but no longer constituted gathering facilities under current legal tests, or were constructed in connection with projects that were certificated without differentiating between jurisdictional transportation and non-jurisdictional gathering facilities. 72 FERC at 62,004.

REASONS FOR DENYING THE WRIT

The Court should deny the Petition because the decision below is consistent with the language of the NGA and the prior decisions of this Court and does not present an important federal question which should be settled by this Court.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT AND REACHES THE SAME RESULT AS A RECENT RULING BY THE D.C. CIRCUIT

Petitioners first contend that the decision below conflicts with *Northern Natural Gas Co. v. FERC*, 929 F.2d 1261 (8th Cir. 1991). *Northern*, however, involved an issue not presented here and, thus, there is no split between circuits. In *Northern*, the court held that, notwithstanding Section 1(b), the Commission had jurisdiction to regulate an *interstate pipeline's* gathering rates by virtue of the "in connection with" language of Section's 4 and 5. 929 F.2d at 1273. In a footnote, the *Northern* Court also volunteered the opinion that gathering facilities owned by a pipeline include facilities owned or operated by an "affiliate, subsidiary, or lessor[]" of the pipeline. 929 F.2d at 1263 n.2. This footnote is clearly *dictum*, however. It is beyond reasonable dispute, and Petitioners do not contend otherwise, that the only question at issue in *Northern* was whether the Commission could regulate gathering rates charged by an *interstate pipeline*. The instant case involves the gathering rates of an affiliated gatherer not of an interstate pipeline. Thus, there is no conflict between the Fifth Circuit's opinion below and the holding of *Northern*.

Instead of conflict, there is agreement between the two circuits which have addressed the question presented in this case. In *Conoco, Inc. v. FERC*, 90 F.3d 536 (D.C. Cir. 1996) ("*Conoco*"), *cert. denied sub nom., Amoco Trading Corp. v. FERC*, ___ U.S. ___, 117 S. Ct. 1017 (Feb. 18, 1997), the D.C. Circuit affirmed the Commission's determination that it lacked jurisdiction under the NGA to regulate the gathering rates charged by an affiliated gatherer, employing essentially the same reasoning as the Fifth Circuit did in the instant case. *See* 117 S. Ct. 1017. Both circuits agreed, moreover, that *Northern* did not decide the question at issue here and so is not in conflict with the determination below that the Commission lacks jurisdiction over affiliated gatherers. *Conoco*, 90 F.3d at 546-47; *PG&E*, 106 F.3d at 1196-97.

II. THE COMMISSION'S ORDERS ARE CONSISTENT WITH THE DECISIONS OF THIS COURT INTERPRETING THE NATURAL GAS ACT

In their effort to concoct a legal issue that merits this Court's review, the Petitioners claim that the Fifth Circuit's opinion below directly conflicts with two decisions of this Court: *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945) ("*CIG*"), and *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947) ("*Interstate*"). According to the Petitioners, *CIG* and *Interstate* established that gathering rates charged by an affiliated gatherer are rates charged "in connection with" jurisdictional interstate transportation or sales by the interstate pipeline and therefore are subject to the Commission's rate-setting authority. Petition at 15.

The Petitioners' argument is based on a complete misreading of *CIG* and *Interstate*. Contrary to Petitioners'

claims, *CIG* and *Interstate* do not even address the subject of gathering rates, much less "establish" that the Commission has jurisdiction to regulate such rates. At issue in *CIG* was the scope of the Commission's authority over *sales for resale rates* of an interstate pipeline where such rates included, among other things, the cost of gathering natural gas. While observing that "[c]ertainly [Section 1(b)] precludes the Commission from any control over the activity of producing or gathering natural gas,"[3] the Court held that the Commission's jurisdiction over sales for resale rates enabled it to take into account the *costs* of gathering and production in determining the reasonableness of the pipeline's bundled sales rate. The case thus concerned solely the manner in which the Commission could regulate jurisdictional sales for resale rates, a matter directly within the Commission's statutory mandate.[4]

---

[3] 324 U.S. at 602-603. That the Court's opinion was meant to exclude rate regulation of gathering is confirmed by the concurring opinion by Justice Jackson, who provided the deciding fifth vote in the Court's 5-4 decision:

> [T]he Act excludes "production or gathering of natural gas" from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction.

324 U.S. at 609.

[4] *See Conoco*, 90 F.3d at 545 (stating that the *CIG* holding "expressly depended upon the company's jurisdictional sales, however; the case does not stand for the proposition that the Commission can regulate the rates charged by any gatherer.").

Petitioners have misstated the holding of *Interstate* in a similar fashion. In that case, the Court upheld the FPC's determination that it could regulate an interstate pipeline company's *sales for resale* in the state where the sales gas was produced. 331 U.S. at 687. Like *CIG*, therefore, *Interstate* involved the sales for resale rates of an interstate pipeline, not the gathering rates of an affiliated gatherer.

In sum, the Fifth Circuit's opinion is fully consistent with this Court's holdings in *CIG* and *Interstate*.

III. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE FERC ADOPTED A PERMISSIBLE INTERPRETATION OF THE NATURAL GAS ACT

Lastly, Petitioners argue this case presents an important federal question in that it gives the Court the opportunity to clarify the "*Chevron*" doctrine.[2] While Petitioners offer several reasons why, in their view, the Fifth Circuit *misapplied Chevron*, they completely fail to explain or provide any justification for their claim that the *Chevron* doctrine itself requires clarification by the Court. Thus, their assertion that this case presents an important federal question requiring review by this Court is demonstrably without merit.

In fact, even the claim that the Fifth Circuit misapplied *Chevron* when it concluded that the Commission adopted a permissible interpretation of the NGA is in error. Petitioners' principal contention is that "the statutory language of Sections 4 and 5 of the NGA, as interpreted by [*CIG*] and

---

[2] Petition at 13. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[*Interstate*], unambiguously encompasses gathering functions performed by a gathering affiliate of an interstate pipeline." Petition at 17. As shown above, however, Petitioners' interpretation of *CIG* and *Interstate* is specious, and thus provides no support for Petitioners' *Chevron* argument.

Petitioners further contend that the case should be resolved in their favor in step 1 of the *Chevron* analysis because, they assert, the NGA *unambiguously* requires the Commission to regulate affiliated gatherers by virtue of language in Sections 4 and 5 requiring that rates charged "in connection with" jurisdictional transportation and sales must be just and reasonable. Petition at 17.

In its orders below, however, the Commission explained why Petitioners' interpretation conflicts with the statutory language, and adopted a plainly permissible reading of the statute. As the Commission found, the language relied on by Petitioners governs only the rates charged "by any *natural-gas company* . . . in connection with the transportation or sale of gas subject to the jurisdiction of the Commission. . . ." 15 U.S.C. § 717c(a) (emphasis added); *see also id.* § 717d(a); *El Paso*, 73 FERC at 61,641. The NGA defines a "natural-gas company" as "a person engaged in the *transportation* of natural gas in interstate commerce, or the *sale* in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6) (emphasis added); *see* 73 FERC at 61,641. The Commission reasonably and properly concluded that because affiliated gatherers such as Field Services do not engage in either jurisdictional sales or transportation, they do not constitute natural gas companies for purposes of the NGA. *El Paso*, 73 FERC at 61,641. Accordingly, because the requirements of Sections 4 and 5 apply only to natural gas companies, Field Services and other affiliated gatherers are not

subject to whatever authority the Commission may have under those sections to regulate rates that are charged "in connection with" jurisdictional sales or transportation. *Id.* This conclusion is particularly compelling in light of Section 1(b), which states the Commission does not have authority to regulate gathering. Thus, the Commission clearly adopted a permissible, if not required, interpretation of the NGA, and thus the Fifth Circuit correctly applied *Chevron*.

The foregoing discussion also demonstrates why the Commission did not, as alleged by the Petitioners, "deregulate" an area that the NGA placed within the Commission's jurisdiction. Petitioners cite *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994), for the proposition that a court may not, under the guise of *Chevron* deference, permit an administrative agency to deregulate an area that Congress has placed by statute within the agency's authority. Petition at 13. *MCI* simply has no application in this case. The Commission did not "deregulate" affiliated gatherers; rather, Congress, by virtue of the statutory language discussed above, never gave the Commission jurisdiction to regulate affiliated gatherers in the first place nor has the Commission ever done so. Accordingly, the Fifth Circuit's opinion does not conflict with *MCI*.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

James R. McCotter
Vice President and
Deputy General Counsel
Michael D. Ferguson
Associate General Counsel
El Paso Natural Gas
Company
100 North Stanton Street
El Paso, Texas 79901
(915) 496-2600

*Richard C. Green
Judy A. Johnson
Kenneth M. Minesinger
Robert M. Lamkin
Andrews & Kurth L.L.P.
A Registered Limited Liability Partnership
1701 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 662-2700

*Counsel of Record

COUNSEL FOR RESPONDENT
EL PASO NATURAL GAS COMPANY